IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 98 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
BB DARYANI – Respondent

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Appearance :

MR MA PATEL ADDL PUBLIC PROSECUTOR for Appellant : 1,
MR SAURABH AMIN FOR KS NANAVATI for Respondent : 1,
NANAVATI ASSOCIATES for Respondent : 1,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 26/12/2006

ORAL JUDGMENT

1. The appellant State of Gujarat has preferred this Appeal under Section 378 of the Code of Criminal Procedure (hereinafter referred to as

'the Code' for short) challenging the order of acquittal dated 12.10.1987 passed by learned JMFC, Surat in Criminal Case No. 1427 of 1984 acquitting the accused by violating the provisions of Section 59 of the Factory Act, 1948 (hereinafter referred to as 'the Act' for short)

2. This Court (Coram: G.T. Nanavati, J.) (as he then was) vide order dated 8.12.1988, granted leave and admitted the appeal. Today, it has been taken up for final disposal.

3. Heard Shri Patel, learned Addl.P.P. for the appellant – State of Gujarat and Mr. Saurabh Amin for Nanavati Associates for respondent – original accused.

4. Brief facts leading to filing this appeal deserve to be set out as under.

5. The original complainant Factor Inspector visited the factory premises of the accused respondent on 12.12.1983 as he had received complaints from the workmen union that in the factory of the accused respondent, the overtime was not paid on an appropriate calculation of the wages. It was alleged that the wages were artificially divided into two parts namely (i) the basis wages and (ii) Dearness Allowance. While calculating the overtime to be paid to the workmen, the dearness allowance was calculated on the basis of actual working days in the month i.e. 26 days in a month whereas, while calculating the basic wage, all days in the

month were being taken as divisible factor for calculating the amount of overtime. This artificial division of the wage taken into consideration for calculating the overtime was said to be contrary to the provisions of Section 59 of the Act and it was also alleged that the Card Punching Allowance and Hazard Allowance were not included into the factor of wages while calculating the overtime. The complaint was lodged in the competent Court by the complainant – Factory Inspector, which came to be registered as Criminal Case No. 1427 of 1984. The accused was summoned and as he pleaded not guilty and claimed to be tried, Court after recording evidence of the complainant and prosecution, came to the conclusion that the factory i.e. accused did not violate the provisions of Section 59(2) of the Act and hence, acquitted the respondent of the charges of violating provision of Section 59(2) of the Act vide his judgment and order dated 12.10.1988, which is impugned in the present Appeal.

6. Shri Patel, learned APP for the State has vehemently submitted that the trial Court has erroneously recorded acquittal of the accused on account of its finding that there was no violation of the provision of Section 59 of the Act. The record and proceedings of the case clearly disclosed that the respondent had in fact, violated the provisions of Section 59 of the Act and thereby, committed an offence making

him liable to be penalised under Section 92 of the Act. Shri Patel has submitted that the respondent factory had adopted an artificial factor for calculating overtime, which has resulted into lesser payment of overtime to the workmen concerned. The respondent did not pay the overtime including the allowances like Card Punching Allowance and Hazard Allowance. Thus, when this facts have come on record, it was not open to the trial Court to come to the conclusion that there was no violation of provision of Section 59 of the Act. Shri Patel has submitted that as the offence is established, the trial Court ought to have convict the accused respondent and inflict appropriate penalty as provided under the law.

7. Shri Amin, learned counsel appearing for the respondent has submitted that this being an acquittal appeal, this Court may not interfere with the order of acquittal unless and until it is aptly demonstrated by the appellant that the order of acquittal has resulted into miscarriage of justice. The order of acquittal deserves to be viewed from the angle of employees/workmens' actual contract with the employer i.e. respondent herein. Shri Amin has submitted that allowances like Hazard Allowance and Card Punching Allowances are not statutory allowances and they have been paid only under settlement arrived at between the parties. Shri Amin has submitted that the workmen of the respondent

factory were in fact, were not entitled to receive the allowances like Card Punching Allowance and Hazard Allowance etc. The said allowances were admissible to the employer only under the settlement, which is in fact a kind of contract between the two parties. The settlement being 2(p) settlement executed between the parties under the provisions of the Industrial Disputes Act, 1947 (herein after referred to as 'the I.D. Act' for short) had statutory force and was therefore binding on both the parties. Shri Amin has submitted that 2(p) settlement between the parties i.e. the workmen and respondent forms part of the record of the trial in Criminal Case No. 1427 of 1984. Shri Amin has invited this Court's attention to Ex. 17 and submitted that this is the settlement under Section 2(p) of the Act and it has a binding force as provided under Section 18(1) of the I.D.Act. Shri Amin has also invited this Court's attention to Clause-13 of the settlement, which provides unequivocally that the payment of Hazard Allowance and Card Punching Allowance shall not result into enhancement of salary and overtime or ESI contribution etc. in other benefits. In other words, Shri Amin has submitted that in view of this, non-inclusion of the allowances like Hazard Allowance and Card Punching Allowance while calculating the overtime payable to the concerned workmen in itself would not amount to violation of

provision of Section 59 of the Act. Shri Amin has submitted that workmen were entitled to waive the inclusion of such allowances while calculating the overtime and such waiver is permissible under law. Shri Amin has relied upon the decision of Madras High Court in case of ***V. VAITHYANATHAN AND OTHERS V. (1) DEPUTY COMMISSOINER OF LABOUR, THIRUCHIRAPALLI,*** reported in 2002(3) LLN p.539, in support of his submission that under 2(p) settlement, which is binding on the parties under Section 18(1) of the Act, the workmen waived certain benefits. In case of V. Vaithyanathan (supra) the workmen had agreed to scaling down of gratuity amount, which was said to be valid and not hit by Section 14 of the Gratuity Act. Shri Amin has also relied upon the decision in case of ***V. BAHULAYAN AND OTHERS VS. STATE OF KERALA AND OTHERS,*** reported in 2000(6) SLR p.713 and submitted that in case of V. Bahulayan (supra), the Kerala High Court in the settlement arrived at between the parties held that the deduction of salary and bonus was permissible and that had been upheld. Relying upon this decision, Shri Amin has submitted that the question of violation of Section 59 of the Act deserves to be viewed in it's proper perspective in this acquittal appeal. Shri Amin has also relied upon the decision of the Apex Court in case of ***Balmer Lawrie Workers' Union, Bombay and another Vs. Balmer Lawrie & Co. Ltd. And others,*** reported in AIR 1985 SC p.311 and

submitted that the Apex Court has approved the deduction in the wages and payment thereof to the Union and such deduction, which was compulsory as per the settlement, was not found to be illegal by the Apex Court. The Apex Court has held that a settlement arrived at on consent of parties can however permit a deduction as it is the outcome of understanding between the parties even though such deduction may not be authorised or legally permissible under the Payment of Wages Act. Shri Amin has submitted that this was the view of the Apex Court in light of the fact that such deduction was not envisaged or permissible under the Wages Act. Shri Amin has submitted that in view of this, it can well be said that the trial Court has rightly acquitted the accused as there was no violation of provision of Section 59 of the Act. Shri Amin has further submitted that the respondent has not made any artificial devision of the wages as alleged by the complainant. The dearness allowance is admittedly paid on the basis of actual days of working i.e. 26 working days in the month, whereas, the respondent Company was making payment of wages of the entire month i.e. month consisting of days namely days in the given month i.e. it can be 30 or 31 or 29 or 28. Thus, the respondent has not violated the said principles as it is defined under the Act. The week is define to be that of 7 days and therefore, this mode of calculation,

though has resulted into lesser payment of overtime, as it is not counted on the basis of 26 days salary, cannot be said to be violative of provision of Section 59 of the Act. Shri Amin has also submitted that the Act is silent in respect of method of calculating wages and allowances for determining the amount of overtime. The formula given under Section 59 of the Act does not exclude such type of allowances and it is being criminal proceedings, unless and until it is established beyond doubt by the prosecution, the respondent cannot be fastion with criminal liability and penalty.

8. This Court has perused the record and proceedings and heard the counsel for the parties at length.

9. Shri Patel, learned APP has vehemently urged that 2(p) settlement which placed on record at Ex. 17, cannot be said to be a statutory document so as to permit the respondent to determine the overtime wages contrary to provision of Section 59 of the Act. Section 59 of the Act clearly provides inclusion of allowances and therefore, once the allowance are paid, they become part of wage and therefore, allowances like Card Punching Allowance and Hazard Allowance were also required to be included while calculating the payment of overtime to the concerned workmen by the respondent factory. Shri Patel has vehemently submitted that artificial division of wages in

two parts for calculating the wages as shown has resulted into lesser payment of overtime to the workmen and therefore, on this count also, it can be said that the respondent has violated provision of Section 59 of the Act and rendering them liable for penalty under Section 92 of the Act.

10. This Court is unable to agree with the submission of Shri Patel. It deserves to be borne in mind that this is an acquittal appeal and therefore, this Court is required to exercise its jurisdiction under Section 378 of the Code in a cases where it is demonstrated by the appellant that the order of acquittal is so perverse and has resulted into miscarriage of justice and is contrary to the provisions of law as to result into miscarriage of justice. The order of penalty and/or punishment envisaged under Section 92 of the Act cannot be passed without their being a case establishing beyond doubt that the respondent accused had committed blatant violation of Section 59 of the Act. Subsection 2 of Section 59 of the Act deserves to be set out as under :-

> *"**Sub-section 2 of Section 59** : For the purposes of sub-section(1), "ordinary rate of wages" means the basic wages plus such allowances, including the cash equivalent of the advantage accruing through the concessional sale to workers of food grains and other articles, as the worker is for the*

time being entitled to, but does not include a bonus and wages for overtime work.

11. Thus, the ordinary rate of wages has been explained by this subsection to mean that such an allowances as the worker is for the time being entitled to, but it does not include the bonus and wages for overtime work. This subsection has expressly excluded that bonus and factor of wage earned by way of overtime while computing and determining the overtime payable to the workmen. This subsection has also unequivocally laid down that allowances such as workmen is for the time being entitled to, the worker to be entitled to an allowances, then, it is to be included while determining the amount of overtime payable to the worker. Shri Amin's submission that the prosecution has not established from the record that the allowances namely Card Punching Allowance and Hazard Allowance were otherwise admissible to workmen irrespective of 2(p) settlement at Ex. 17. The admissibility of card punching allowance and Hazard Allowance emanates from 2(p) settlement, which is forming part of the record and in that very settlement the expressed term is provided to exclude this allowances while determining the amount of overtime payable to the workmen. Thus, in absence of any such provision indicating that workmen of the respondent factory otherwise entitled to receive the Hazard Allowance and Card Punching Allowance, couple with the fact

that they have expressly agreed in 2(p) settlement for exclusion of these allowances while calculating the overtime would go to show that non-inclusion of this allowances while calculating the overtime would not amount to violation of provision of Section 59 of the Act. Shri Amin has submitted that the dearness allowance is always paid on the basis of the actual working days, while in the respondent factory, wages are calculated on the basis of days of given month. It is also submitted that the respondent authority does not calculate basic wages on the basis of actual days of working and therefore, the counting of wages on the basis of days in the month, cannot be said to be illegal and/or in violation of Section 59 of the Act.

12. Looking to the record and proceedings, this Court is of the view that prosecution has not proved its case beyond reasonable doubt so as to bring home guilt on the part of the respondent. It deserves to be noted that assuming for the sake of examining the plea with regard to violation of Section 59 of the Act that another view was possible, for bringing home guilt on the part of the accused, then also, the order of acquittal cannot be disturbed basing upon such plausible view under Section 378 of the Code.

13. In the result, this Court is of the view that the order of acquittal dated dated 12.10.1987

passed by learned JMFC, Surat in Criminal Case No. 1427 of 1984 does not call for any interference and the appeal, therefore, deserves to be dismissed and is dismissed accordingly.

(S.R.BRAHMBHATT, J.)

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